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10 **UNITED STATES DISTRICT COURT**

11 **DISTRICT OF NEVADA**

12 JENNIFER STEPHENS and
 CHRISTOPHER GULLEY, on behalf of
 13 themselves and all others similarly
 situated,

14 Plaintiffs,

15 vs.

16 COMENITY LLC dba COMENITY
 17 BANK,

18 Defendant.

CASE NO. 2:17-cv-00670-MMD-NJK

THIRD PARTY COMPLAINT

19 COMENITY LLC,

20 Third-Party Plaintiff,

21 vs.

22 JACKIE WASOWICZ, an individual,

23 Third-Party Defendant.
 24

25 Defendant/Third Party Plaintiff, Comenity LLC, brings this action against
 26 Third Party Defendant Jackie Wasowicz ("Wasowicz"), pursuant to Federal Rules of
 27 Civil Procedure 14(a)(1) and 18(a), and alleges:
 28

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Parties

1
2 1. Comenity LLC is a Delaware limited liability company that is wholly-
3 owned by ADS Alliance Data Systems, Inc., a Delaware corporation with its
4 principal place of business in Texas. Comenity LLC's principal place of business is
5 in Ohio.

6 2. Wasowicz is an individual residing in Las Vegas, Nevada and is a
7 citizen of the State of Nevada.

Jurisdiction and Venue

8
9 3. The Court has subject matter jurisdiction over Comenity LLC's third
10 party claims for equitable and implied contractual indemnification, breach of
11 contract, fraud and negligent misrepresentation pursuant to 28 United States Code
12 § 1332 since Comenity LLC is diverse in citizenship from Wasowicz and more than
13 \$75,000, exclusive of interest and costs, is in controversy.

14 4. This Court also has supplemental jurisdiction for all of Comenity LLC's
15 claims against Wasowicz pursuant to 28 U.S.C § 1367(a), because Plaintiffs Jennifer
16 Stephens' Complaint against Defendant Comenity LLC raises a federal question,
17 and the claims herein are so related to the claims in the action within such original
18 jurisdiction that they form part of the same case or controversy under Article III of
19 the United States Constitution.

20 5. The Court has personal jurisdiction because a substantial portion of the
21 acts or omissions giving rise to Wasowicz's liability occurred in Nevada.

22 6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) because a
23 substantial part of the events or omissions giving rise to the claim occurred in this
24 district and Wasowicz is subject to personal jurisdiction in this district.

General Factual Allegations

25
26 7. Comenity Bank, a wholly owned subsidiary of Comenity LLC
27 (hereinafter, "Comenity"), issues private label credit cards.
28

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1 8. On or about August 3, 2015, Wasowicz opened a Victoria's Secret-
2 branded credit card account with Comenity Bank (the "Account").

3 9. In connection with the Account, Wasowicz entered into an account
4 agreement (the "Account Agreement") that allows her to use the Account to make
5 purchases. Wasowicz agreed to the terms of the Account Agreement by using her
6 Comenity credit card.

7 10. The Account Agreement provides, and Wasowicz thereby agreed, that
8 Comenity could contact Wasowicz by various means, including the use of auto dialer
9 systems, about the Account by calling or texting any telephone numbers she
10 provided.

11 11. The ability to contact Wasowicz through valid telephone numbers for
12 which she was the subscriber or customary user is one of Comenity's bargained-for
13 benefits under the Account Agreement.

14 12. Wasowicz provided Comenity with, among other phone numbers, a
15 phone number (the "Subject Number") that her mother, Plaintiff Jennifer Stephens
16 ("Stephens"), contends belongs to her.

17 13. Wasowicz represented that Comenity could legally contact her at the
18 Subject Number.

19 14. Comenity relied on Wasowicz's representation.

20 15. Comenity reasonably concluded that Wasowicz was the subscriber or
21 customary user of the Subject Number.

22 16. Comenity attempted to contact Wasowicz at the Subject Number to
23 discuss the Account.

24 17. On March 6, 2017, Stephens filed a Class Action Complaint against
25 Comenity in the United States District Court for the District of Nevada, alleging
26 violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.*
27 ("TCPA").
28

18. Stephens alleges that Comenity contacted her on the Subject Number in an attempt to collect a debt owed by Wasowicz, her daughter.

19. Stephens alleges that calls were placed using an “automatic telephone dialing system” and left messages using an “artificial or prerecorded voice.”

20. Stephens alleges that Comenity made calls to the Subject Number in violation of the TCPA.

21. If Stephens prevails, Wasowicz’s acts or omissions will be the proximate cause of Comenity’s damages which will exceed \$75,000.

Count One

(Indemnification)

22. Comenity re-alleges and incorporates all preceding paragraphs.

23. The Federal Communications Commission interprets “called party” for the purposes of determining who can express consent under the TCPA as either the “current subscriber or customary user” of a telephone number, including “individuals who might not be the subscriber, but who, *due to their relationship to the subscriber*, are the number’s customary user and can provide prior express consent.” 2015 FCC Order, 15-72 FCC Rcd. at 40–41, ¶¶ 73–75 (emphasis added).

24. Wasowicz agreed, warranted, promised and represented that she could be legally contacted as the subscriber or customary user of the Subject Number.

25. Comenity relied upon these representations in opening the Account, maintaining the Account and in attempting to contact Wasowicz.

26. Comenity’s reliance was reasonable.

27. Comenity’s alleged liability to Stephens is solely derived from Wasowicz’s actions in that she provided to Comenity and thereby authorized it to call the Subject Number to contact her regarding the Account.

28. The damages Stephens alleges in her Complaint, if any, are a direct result of Wasowicz’s acts or omissions.

29. Comenity is without fault in causing Stephens’ alleged damages.

31. Accordingly, Wasowicz should be held to indemnify Comenity for all amounts for which Comenity may be liable to Stephens, including any damages, costs, attorneys' fees, or any other sums Comenity is assessed, as well as to pay for the costs and fees incurred by Comenity in defending Stephens' lawsuit and costs and fees incurred in pursuing indemnification from Wasowicz.

(Breach of Contract)

33. The Account Agreement is a valid and enforceable contract.

35. Wasowicz warranted, promised and represented that the Subject Number was a valid contact number for which she was the subscriber or customary user.

37. Should Stephens be awarded any sums, including any damages, costs or attorneys' fees against Comenity, any such award will constitute conclusive proof that Wasowicz breached the Account Agreement by providing Comenity with a telephone number with respect to which she was neither the subscriber nor customary user.

38. Accordingly, Wasowicz should be held liable for any and all damages awarded Stephens under the TCPA, including any costs and attorneys' fees assessed

1 against Comenity, as consequential damages arising directly from Wasowicz's breach
2 of contract.

3 Count Three

4 (Fraud)

5 39. Comenity re-alleges and incorporates all preceding paragraphs.

6 40. Having valid and legal contact information for Wasowicz is material to
7 Comenity under the Account Agreement.

8 41. Wasowicz warranted, promised and represented that she was the
9 subscriber or a customary user of the Subject Number.

10 42. Wasowicz gave Comenity express consent to contact her at the Subject
11 Number.

12 43. Accordingly, Stephens can only prevail in her claims under the TCPA if
13 Wasowicz's representation to Comenity was false and Wasowicz was not capable of
14 expressing consent with respect to the Subject Number.

15 44. Assuming Stephens' allegations are true, Wasowicz knew or should
16 have known that she was not the subscriber nor the customary user of the Subject
17 Number.

18 45. Wasowicz provided the Subject Number for the express purpose of
19 serving as a valid number for Comenity's future communication with Wasowicz
20 regarding the Account.

21 46. Wasowicz intended to induce Comenity to use the Subject Number for
22 that purpose.

23 47. Assuming Stephens' allegations are true, Comenity was unaware that
24 Wasowicz, Stephens' daughter, was neither the subscriber nor the customary user of
25 the Subject Number.

26 48. Comenity's reliance on Wasowicz's representation was reasonable.

27 49. If Stephens prevails on the TCPA claims alleged in the Complaint, any
28 damages awarded, including costs and reasonable attorneys' fees, will be the

1 consequential and proximate result of Comenity's reasonable reliance on Wasowicz's
2 misrepresentation regarding the Subject Number.

3 50. Accordingly, Wasowicz should be held liable for any and all damages
4 awarded to Stephens under the TCPA, including any costs and attorneys' fees
5 assessed against Comenity.

6 **Count Four**

7 **(Negligent Misrepresentation)**

8 51. Comenity re-alleges and incorporates all preceding paragraphs.

9 52. Assuming Stephens' allegations are true, Wasowicz, in the course of her
10 dealings with Comenity under the Account Agreement, provided Comenity false
11 information about the Subject Number, including the false representation that
12 Wasowicz was an the subscriber or the customary user of the Subject Number.

13 53. Wasowicz intended, or could reasonably foresee, that Comenity would
14 rely on the aforementioned representation

15 54. Assuming Stephens' allegations are true, Wasowicz failed to exercise
16 reasonable care.

17 55. Comenity's reliance on Wasowicz's representations was reasonable.

18 56. If Stephens prevails on the TCPA claims alleged in the Complaint, any
19 damages awarded, including costs and reasonable attorneys' fees, will be the
20 consequential and proximate result of Comenity's reasonable reliance on Wasowicz's
21 negligent misrepresentation regarding the Subject Number.

22 57. Accordingly, Wasowicz should be held liable for any and all damages
23 awarded Stephens under the TCPA, including any costs and attorneys' fees assessed
24 against Comenity.

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Prayer for Relief

WHEREFORE, Third Party Plaintiff Comenity prays for judgment against Wasowicz as follows:

- A. For compensatory and consequential damages in an amount in excess of \$75,000 to be proven at trial;
- B. For pre- and post-judgment interest on the foregoing sums at the highest rate permitted by law;
- C. For the costs incurred in bringing this third party action, including reasonable attorneys' fees;
- D. For the costs incurred in defending against the Class Action Complaint filed by Plaintiff Stephens, including reasonable attorneys' fees;
- E. For all other relief the Court deems just and proper under the circumstances.

Dated: April 25, 2017.

Ballard Spahr LLP

By: /s/ Joel E. Tasca
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*Attorneys for Defendant/Third-
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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of April, 2017, a copy of the above THIRD PARTY COMPLAINT was served via the Court's CM/ECF filing system to all counsel of record listed below:

Alexis M. Wood, Esq.
Kas L. Gallucci, Esq.
Ronald A. Marron, Esq.
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